

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Tesla, Inc., Securities)
Litigation.) No. CV-18-04865-EMC
_____)

San Francisco, California
June 16, 2022

BEFORE: THE HONORABLE EDWARD M. CHEN

REPORTER'S TRANSCRIPT OF PROCEEDINGS VIA ZOOM PLATFORM

MOTION FOR CERTIFICATE OF APPEALABILITY

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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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A P P E A R A N C E S

(Appearing via Zoom platform)

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P R O C E E D I N G S

(The proceedings started at 1:28 p.m.)

COURTROOM DEPUTY: These proceedings are being recorded by this court. Any other recording of this proceeding either by video, audio, including screen shots or any copying of the hearing is strictly prohibited.

This Court is now in session. The Honorable Edward M. Chen presiding. Court is calling the case In Regarding Tesla, Inc., Securities Litigation.

Counsel, please state your appearance for the record, beginning with the plaintiff.

MR. PORRITT: Good afternoon, Your Honor, Nicholas Porritt of the firm Levi & Korsinsky on behalf of the plaintiff and the class. With me are Adam Apton and Adam McCall, also of Levi & Korsinsky.

THE COURT: All right. Good afternoon, Mr. Porritt.

MR. PORRITT: Good afternoon, Your Honor.

MS. SULLIVAN: And for the defendant good afternoon, Your Honor, this is Kathleen Sullivan for Tesla.

THE COURT: All right. Thank you, Ms. Sullivan, good afternoon.

MS. SULLIVAN: Good afternoon, your Honor.

THE COURT: Okay. So this is Tesla's motion to reconsider my summary judgment order, particularly on the question about materiality and whether I had found materiality

1 for some purposes and not others, as I understand the
2 argument, and that there's inconsistency to assume or for me,
3 if I did, find materiality with respect to falsity and
4 scienter, because each of those requires that the defendant
5 made a material misrepresentation or omission, and not to find
6 materiality because I only assumed arguendo that -- in the
7 reliance -- on the reliance question.

8 And maybe -- maybe the answer is clarity here if I
9 didn't make it clear. When I look back at my order and it
10 seems evident to me, maybe I didn't make it clear enough, that
11 all that I found with respect to falsity was that no
12 reasonable juror could find the statement, for instance,
13 "funding secured" accurate and not misleading.

14 So I was only talking about falsely in the literal
15 sense that it was not accurate. It was inaccurate or
16 misleading, not that that inaccuracy or misleading was
17 material. So the false -- so the falsity element that's
18 required for a 10b-5 is not -- has not been completely
19 fulfilled, but obviously one component that it was a false
20 statement within, let's say in a literal sense, not in a legal
21 sense; and similarly with scienter, no reasonable juror could
22 find that Mr. Musk did not know or didn't act in disregard to
23 the inaccuracy -- the factual inaccuracy, not the legal.

24 And so I didn't -- and that's why I did not find --
25 when we got to looking at the reliance question, I did not

1 find that there was a predicate of materiality under the
2 fraud-on-the-market doctrine. I only looked to even if there
3 were, they were factual questions so there's actual reliance.

4 So that's what I intended, and so once I've laid
5 that out it seems to me that there is not an inconsistency
6 there. To be clear, I did not find materiality with respect
7 to the misrepresentation or a reckless disregard or knowingly
8 scienter with regard to any such material representation.

9 I'll let the parties comment. But, I mean, that's
10 what I intended and I think that's what I said; but if you
11 have further comments, I'll take those.

12 MS. SULLIVAN: Well, Your Honor, if I may begin for
13 Tesla?

14 THE COURT: Yeah.

15 MS. SULLIVAN: Well, first of all, thank you very
16 much, Your Honor, for that clarification and Tesla, of course,
17 believes that Your Honor was completely correct in the holding
18 that the reliance element must go to the jury, can't be
19 decided as a matter of law because there are triable issues of
20 fact with respect to price impact; and if there wasn't any
21 ability to move the market on the price, then there would not
22 be materiality for purposes of Goliath on the
23 fraud-on-the-market theory. So to begin with your reliance
24 ruling, your Honor, we think it's completely correct.

25 Your Honor's clarification is very helpful because

1 falsity is -- excuse me.

2 Sorry, Your Honor, for that.

3 THE COURT: Normally I confiscate your phone, but I
4 can't do that over the Internet so. . .

5 MS. SULLIVAN: Your Honor, we were just trying to
6 make sure that you could hear me, and I take it there are no
7 tech issues?

8 THE COURT: No, we can hear you fine.

9 MS. SULLIVAN: Thank you, Your Honor.

10 So, Judge, the clarification, Your Honor, that Your
11 Honor was not deciding materiality as a matter of law as to
12 any of the three elements at issue on the summary judgment
13 motion, falsity, scienter, or reliance is very helpful and we
14 did ask for that as alternative relief, Your Honor; but if I
15 could, Your Honor, may I just say why we think that's not an
16 entire fix here?

17 THE COURT: Sure.

18 MS. SULLIVAN: That is because the falsity and
19 scienter -- you can't disaggregate the falsity of the
20 statement from its material falsity, and we think it's legally
21 impossible to disaggregate the scienter toward a materially
22 misleading statement from its materiality.

23 So, in other words, it's not quite enough to say
24 well, I'm going to send abstract falsity -- I'm going to take
25 abstract falsity away from the jury but let the jury decide

1 whether it was a material false statement, a statement that
2 would alter the mix of information for investors in the
3 marketplace in a way that mattered to them; and it's not quite
4 enough to take scienter away from the jury because, again,
5 falsity and scienter as a -- each as a whole incorporate
6 materiality as a necessary predicate.

7 So, Your Honor, maybe I can use the metaphor of it's
8 a coin, and falsity has a materiality requirement that's built
9 into it. You can't carve the coin in half. You have to let
10 falsity go to the jury in its entirety.

11 THE COURT: Well, why is that? Why is that,
12 Ms. Sullivan? You can have something that's false. There is
13 such thing as something that's false or true, right,
14 literally; but it could be not material, I mean -- and that's
15 exactly what we have here.

16 It was -- I found it was false to say "funding
17 secured," but it may well be that the average, reasonable
18 investor cared more about the 420 and the fact of going
19 private, the fact -- you know, all the things that go with it
20 rather -- and didn't care that much. I mean, I don't know if
21 that's -- one would argue, you know, that's -- it's pretty
22 important, therefore, it would be objectively material; but
23 you could have a false statement that's kind of insignificant.

24 So why can't you carve that up into two?

25 MS. SULLIVAN: Well, Your Honor, we think that the

1 garning precedent requires -- and we've cited it in detail in
2 the briefing, Your Honor, but, you know, if you look at *Dura*,
3 *Matrixx*, the original basic decision, if you look at *Amgen*,
4 *Halliburton* and *Goldman Sachs*, if you look at all of the
5 decisions that treat materiality as baked into falsity,
6 materiality is baked into scienter and, of course, as Your
7 Honor correctly decided, materiality is baked into reliance,
8 meaning baked into price impact in a fraud-on-the-market case,
9 then, Your Honor, with respect, we don't think you can take
10 falsity and scienter away from the jury if materiality is in
11 dispute as you now have -- as Your Honor has now correctly, I
12 think, clarified it is in factual dispute. It is in triable
13 dispute.

14 And that's because, Your Honor, materiality is a
15 necessary prerequisite for a false statement. It isn't just
16 any false statement that's reached by the securities laws.
17 It's only a material false statement, a statement that would
18 alter the mix of information.

19 THE COURT: That's why I said it's not a done deal
20 for 10b-5. The element of falsity and scienter have not been
21 automatically fulfilled here because there's a component of
22 that, but I do see it as -- you know, a jury's going to have
23 to decide two things normally. Was it false in a literal
24 sense -- I mean, because if it's accurate, you don't even get
25 to materiality, right?

1 If somebody's accurate, that's it. That's game
2 over, defendant wins; but if it's not accurate, they still
3 have to decide, "Well, is that inaccuracy -- did it matter to
4 the average -- to the reasonable" -- so it is a two-stage
5 analysis in the ultimate analysis, and I'm saying stage one I
6 find that it was inaccurate -- factually inaccurate. I know
7 you disagree with that, but that's what I found; but it
8 doesn't answer the question about materiality.

9 So falsity within the meaning of 10b-5 as a term of
10 art has not been taken off the table. That's still -- there's
11 still a component of that that's still live.

12 MS. SULLIVAN: Well, we -- we appreciate that very
13 much, Your Honor, and that's a very helpful clarification; and
14 it does enable us to go to the jury on whether the statement
15 was materially -- the statements were materially false and to
16 go to the jury on whether scienter was established as to a
17 materially false statement.

18 That's helpful; but, Your Honor, we respectfully
19 think that you can't direct the jury to find falsity or
20 scienter halfway. We think it's one element -- one
21 indivisible element in which you can't segregate the falsity
22 from the materiality of the statement and you can't segregate,
23 as a matter of law, the scienter from the intent with respect
24 to the material misstatement because the securities laws are
25 concerned only with deliberately or recklessly made material

1 false statements.

2 So, Your Honor, we believe there's still the risk of
3 reversible error in directing the jury -- taking away from the
4 jury the chance to decide falsity as a whole, scienter as a
5 whole; and if that were to infect the trial -- of course, that
6 was the reason we suggested interlocutory review as an
7 alternative to Your Honor's reconsideration.

8 If that were to infect the trial such that the
9 Circuit ultimately decided, well, falsity really had to go all
10 the way to the jury, couldn't just go halfway to the jury, or
11 scienter had to go all the way to the jury, it couldn't just
12 go halfway to the jury, if that were to prove reversible
13 error, we would be back in a situation I am sure no one,
14 including Your Honor wants us to be in, and that would be
15 facing a second trial after all the exertion that went in to
16 the first one.

17 So, Your Honor, I think that's the key point, is
18 that falsity and scienter are not divisible elements with two
19 steps. They're single elements in which materiality is a
20 necessary prerequisite for the finding; and because Your Honor
21 correctly found materiality to be in dispute for reliance,
22 it's also in dispute for falsity and scienter, but that means
23 the whole element of falsity and scienter is in dispute.

24 THE COURT: All right.

25 Mr. Porritt or I'm not sure if it's Mr. Apton or

1 Mr. McCall want to respond.

2 MR. PORRITT: Thank you, your Honor.

3 So my initial reaction is this debate is somewhat
4 trivial in the sense that there's no dispute that the -- what
5 was said in the tweets were material. I mean, everyone
6 agrees. Plaintiff agrees, defendant's expert agrees.

7 So this whole debate about being able to argue --
8 they're gonna argue to the jury that the over seven tweets
9 were immaterial at the time they were made is completely
10 hypothetical because, no, they won't because there's no
11 evidence.

12 THE COURT: I didn't find that. If you look in my
13 opinion, I didn't make that finding. I understand the
14 argument that the defendant's own expert referred to it as
15 material; but, of course, the comeback to that was, well, you
16 looked at the price for -- after the partial correction. You
17 didn't see any movement at all, and you would have expected
18 something.

19 There were several things going on. I think I made
20 a -- maybe in the context of reliance that it may be that the
21 thing that moved the price initially was the announcement --
22 the big announcement was, "We're going private. I'm going to
23 take it private" and "420."

24 So I'm not going to reargue this because you didn't
25 move for reconsideration, but I'm telling you I did not find

1 -- and maybe you think I should have found -- but I did not
2 find -- and I searched. I re-read my order several times. I
3 did not say that this was material. I just said it was
4 inaccurate and misleading.

5 MR. PORRITT: Understood and we would agree. We
6 obviously didn't seek reconsideration on that point; and, as I
7 said, I just don't think -- I think it's sort of an academic
8 debate now because I think the evidence -- there is no
9 evidence that is to immaterial and even the -- the parts -- it
10 has to be assessed at the time it was made.

11 So on August 7th the materiality is so -- it's so
12 overwhelming in this case that -- and that their own expert
13 doesn't even offer an opinion that it was immaterial. So
14 there is nothing in the record to suggest it was immaterial.

15 So we're happy to take that issue to the jury. The
16 jury will presumably decide based on the evidence in court
17 that it was immaterial, because there really is no other
18 conclusion it can reach; but Your Honor didn't feel like it --
19 you were able to get to there on the summary judgment order
20 and that's fine. You know, we'll accept that.

21 So -- and then for the purposes of -- you did not
22 find that reliance was an issue, I don't believe, for the
23 purposes of -- or materiality was an issue in terms of
24 reliance. You assumed -- according to the order, you assumed
25 materiality for the purposes of establishing a presumption.

1 You established there was a -- as far as I
2 understand the ruling, there was a issue of material fact as
3 to whether defendants could rebut the presumption, which
4 means --

5 THE COURT: Yeah, which is factual reliance, right.

6 MR. PORRITT: So -- which means you have to
7 completely sever the effect of the misrepresentation, or
8 what's in the tweet, from the stock price at a particular
9 point in time.

10 I mean, that's -- so materiality -- whether you view
11 it as materiality, that's really the same inquiry as kind of
12 loss causation. You say she's saying that the loss causation
13 is now diminished down to zero, so it has a zero impact is
14 really what you're arguing in that particular inquiry.

15 THE COURT: What's your response to Ms. Sullivan's
16 point that -- even on the point of inaccuracy, what I call
17 falsity, kind of a literal sense, not a legal sense, I can't
18 really do that. I can't separate that from materiality. It's
19 improper for the Court to say, "Well, I do find it was
20 inaccurate. That leaves the question whether it was
21 materially inaccurate."

22 MR. PORRITT: Yeah, I would say Your Honor is
23 absolutely correct. Courts do that all the time. You can
24 take a very classic example, which is in a restatement case,
25 for instance, the county restatement, where people misstate

1 revenues. That's -- their prior revenue was false. It was in
2 error. They corrected it. They might correct it six months
3 later.

4 Lots of Courts at motion to dismiss level say, yes,
5 but the chain was so immaterial that I'm gonna -- you know,
6 we're gonna deny -- you know, we're gonna grant a motion to
7 dismiss and dismiss the claim at that particular point in
8 time. So it's just not true that you can't -- that they are
9 so interwoven you can't decide one without the other.

10 So that would be my response.

11 THE COURT: All right. That's a pretty simple,
12 clear-cut response. Ms. Sullivan, what's wrong with that?
13 Take a numbers statement that's simply wrong. That can be
14 inaccurate, but it may not be material.

15 MS. SULLIVAN: Your Honor, the question of falsity
16 and scienter are for the jury. It isn't the truth -- Courts
17 do this all the time, as Your Honor well knows. Summary
18 judgment for defendants is common in securities class actions,
19 but summary judgment for plaintiffs which take the issue of
20 falsity and scienter away from the jury are quite uncommon.

21 In fact, my friend on the other side I don't believe
22 can cite -- or has cited a single case in which falsity and
23 scienter were taken away from the jury; and, Your Honor, I
24 think the main point is that falsity must -- falsity must be
25 material and it's the jury's province to decide whether a

1 reasonable investor would have found that the false statement
2 altered the mix of information on which that investor decided
3 to buy or sell or hold the security.

4 So it's the jury's decision whether the false
5 statement was a material false statement that is a single
6 inquiry and it must be done as a whole by one decision maker,
7 and that should be the finding -- finder of fact here, which
8 would be the jury.

9 So, Your Honor, I see the logic in Your Honor's
10 point but, unfortunately, I think it's a legally unacceptable
11 thing to disaggregate falsity from materiality, send one to
12 the jury and one not or to disaggregate scienter from
13 materiality.

14 In fact, I don't know of any decision that
15 disaggregates the elements. The cases we cite all discuss
16 falsity as requiring materiality, scienter as requiring
17 materiality, and if there's no falsity -- no material falsity,
18 Your Honor, we wouldn't even get to the scienter question.

19 So the real point here, Your Honor, is that we've
20 got to be sort of all in or all out of jury determination
21 here. I -- I appreciate Your Honor's clarification very much
22 that Your Honor is allowing materiality to go to the jury, but
23 we fear that that might become a reversible error down the
24 line and it would be far better to simply reconsider and send
25 the issues of falsity and scienter in their entirety to the

1 jury because -- to put it another way, Your Honor, there's
2 kind of no such thing as an immaterial false statement in
3 securities law.

4 The securities law is not a requirement of literal
5 truthfulness. It's a requirement of material truthfulness in
6 the market and, therefore, to disaggregate the question and
7 carve it up into one issue for the Court to decide and one
8 half for the jury to decide, we respectfully submit it's a
9 potentially reversible error that the Court need not wade into
10 at this point and if Your Honor thinks -- I actually think
11 it's a new question of first impression, the idea that you can
12 separately decide technical falsity as a matter of law, but
13 allow materiality when the facts are disputed and triable to
14 go to the jury.

15 That almost raises a new legal question of first
16 impression, Your Honor. So certification to the Ninth Circuit
17 might be an option if Your Honor is choosing to clarify
18 part way but not reconsider all the way the falsity and
19 scienter determination.

20 THE COURT: Well, let's talk about the certification
21 or 1292(b). Normally you need to show a substantial ground
22 for difference of opinion, not just that something is novel.
23 Maybe there's grounds if it's completely novel, but I'm not
24 familiar with any case that says a Court is barred from taking
25 certain other fact -- otherwise factual questions away from

1 the jury when it's so clear that no reasonable jury could find
2 on a particular fact.

3 It's not unusual for a Court to -- or party to move
4 for partial summary adjudication and say, well, all right, we
5 don't win the whole ball of wax. We're not going to get rid
6 of the whole cause of action, but Elements 2 and 3 or Facts X
7 and Y we want, you know, found and so -- and to so instruct
8 the jury. We do that all the time.

9 If it is so clear -- now you may disagree, but if it
10 is so clear that something cannot be found by a reasonable
11 juror in any other way, I don't -- I know of no law that says
12 "Well, you still have to go to trial -- unless you do the
13 whole ball of wax, you still have to send everything to the
14 jury even if certain elements are very clear."

15 I don't know why you're forced to -- the Court would
16 be barred from disaggregating certain facts, making findings,
17 and that's what partial summary adjudication is about.

18 MR. PORRITT: And, Your Honor, if I may address that
19 point and also the prior point made by my friend,
20 Ms. Sullivan. The Ninth Circuit in *Monroe v. Hughes*, case
21 from 1994, said quite clearly the elements of a 10b-5 claim
22 involve a false statement. That such statement or omission
23 was material. That's factor two. Three, reliance. Four,
24 active scienter or intent to defraud.

25 So -- and in *Provenz v. Miller*, 102 F.3d 1478, you

1 know, they identified materiality as a second element of Rule
2 10b-5. *Monroe v. Hughes* is 31 F.3d 772.

3 So other Courts -- and as we talked about in the
4 context of -- you know, in accounting cases and motions to
5 dismiss statements are assessed -- false statements are
6 assessed with materiality all the time. That's not a --
7 that's not a -- that's not an unusual inquiry. So there's
8 nothing novel about what Your Honor did here.

9 So with respect, my friend, Ms. Sullivan, is just
10 incorrect in saying this is novel or that she's never heard of
11 or cannot find a case where this is being considered
12 separately as a separate element.

13 And on the question of certification for appeal, I
14 think Your Honor is absolutely right. This is the very
15 definition of what would be considered a piecemeal appeal. I
16 mean, the Section 1292 jurisprudence says very clearly that,
17 you know, cases that involve a -- you know, application of law
18 to the detailed facts involved in the case, as exactly what
19 Your Honor did in the summary judgment motion, are
20 particularly ill suited for 1292 certification.

21 So here I don't think there's any -- there's no -- I
22 don't think there's -- your order gets anywhere close to
23 meeting the 1292 requirement for certification of
24 appealability, your Honor.

25 THE COURT: All right. Ms. Sullivan, I'll give you

1 the last word and then I'm going to move on.

2 MS. SULLIVAN: Your Honor, just to be clear, I want
3 to make sure I understand Your Honor.

4 You're clarifying that we may go to the jury on
5 materiality for purposes of falsity element, materiality for
6 purposes of the scienter element, and materiality for purposes
7 of the reliance element, that materiality is in play as to all
8 three?

9 THE COURT: It is right now. Now, if something
10 happens, there's a summary judgment motion or some other kind
11 of in limine motion later that makes it so clear that even
12 that doesn't go to the jury, so I'm not saying -- but I'm
13 saying as of right now those are jury issues. Those are
14 factual issues.

15 MS. SULLIVAN: Understood, Your Honor, and we -- we
16 very much appreciate that. Let me just take one last try,
17 Your Honor, at why we think you should go one step further and
18 send falsity and scienter in their entirety to the jury; and
19 the reason is, this is not like a motion for summary
20 adjudication where you rule on one claim and not another claim
21 or one element or not another element.

22 Our main argument here is materiality is an
23 inextricable, necessary prerequisite for a securities
24 violation falsity. It's a necessary, inextricable sub element
25 of scienter; and so, Your Honor, you wouldn't be carving out

1 an element and sending the element to the jury.

2 The legal error, which may prove problematic
3 ultimately on appeal, is separating out a sub element or a
4 component of an element and dividing the element into two
5 parts and sending one piece to the jury and one -- and keeping
6 one piece away from the jury.

7 We think it creates confusion and taints the
8 ultimate verdict if the Court is essentially directing the
9 jury on technical falsity and technical recklessness even
10 though falsity and scienter can exist only if it was falsity
11 with respect to a material misstatement.

12 So, Your Honor, we respectfully would urge you to
13 just go one step further, let falsity and scienter go to the
14 jury in its entirety. We also appreciate that Your Honor has
15 clarified that materiality is in play for all three issues.

16 THE COURT: All right. Thank you, counsel.

17 My original order stands. To the extent that
18 there's any ambiguity, I will make doubly clear now that I did
19 not make any finding that the inaccuracy, which I found as a
20 matter of law that was made in the three instances and
21 scienter -- and finding scienter in regard thereto, I did not
22 make any finding about materiality of the inaccuracy or we
23 call it falsity, inaccuracy, misleadingness.

24 That is still an element and it's the same element
25 -- materiality informs all three factors, all three elements:

1 reliance, scienter and falsity. That's still a question at
2 this point for the jury.

3 The only thing I'm taking away from the jury is the
4 inaccuracy of the statements and whether or not -- and I think
5 -- you know, I think that is the proper thing to do since I
6 found that no reasonable juror could find otherwise and I
7 don't see a -- any basis for granting a 1292(b) petition for
8 interlocutory appeal.

9 I really made a factual finding, not a legal
10 finding; and in any event even if it's deemed a legal finding
11 -- the question is -- legal question whether I can
12 disaggregate in the way that Ms. Sullivan says I shouldn't, I
13 find there's no quote "substantial ground" for difference of
14 an opinion on that particular and therefore -- and I don't
15 think it's going to materially advance termination of this
16 litigation.

17 So I'm denying the request for a 1292(b), and I
18 guess I'm denying the motion for leave for reconsideration
19 because I -- but I am issuing this clarification for that
20 purpose. So there you have it, thank you.

21 MS. SULLIVAN: Thank you, your Honor.

22 THE COURT: Thank you everyone.

23 MR. PORRITT: Thank you, your Honor.

24 THE COURT: Thanks.

25 *(Proceedings ended at 1:55 p.m.)*

REPORTER'S CERTIFICATION

I, TERI VERES, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 21st of June, 2022.

s/Teri Veres
TERI VERES, RMR, CRR